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To: Group Director

Group: 3720

Fax No.: 703-305-3762

Date: July 9, 2004

Total pages including cover sheet: 10 pages

Re: Serial No. 09/921,762 (attorney docket No. RPC 0575 PUS)

Dear Director Rollins-Cross:

Attached please find the following documents:

1. Petition to Withdraw Notice of Non-Compliance (9 pages)

Thank you. Please call if you have any questions.



Konstantine Diamond

Docket No.: RPC 0575 PUS
Serial No. 09/921,762

UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANT: Justin M. Smyers, et. al EXAMINER: Castellano
SERIAL NO.: 09/921,762 GROUP ART UNIT: 3727
FILING DATE: August 3, 2001
FOR: Stackable Crate
DOCKET NO.: RPC 0575 PUS

PETITION TO WITHDRAW NOTICE OF NON-COMPLIANCE

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Applicant requests the withdrawal of the Notice of Non-Compliance mailed June 18, 2004.

Brief Summary of Relevant Facts

On February 2, 2004, Applicant filed a Notice of Appeal.


On April 5, 2004, Applicant filed an Appeal Brief.

On June 18, 2004, the Examiner mailed a Notice of Non-Compliance with the following objections:

Item 5: Several of the issues, several of the grounds of rejection and the arguments section make reference to "prior art Fig. 1" as being the reference being relied upon. The rejections are clear in stating "the admitted prior art." The admitted prior art includes both Fig. 1 and appropriate sections of the specification which describe prior art. For clarity sake, it would be more proper for appellant to rewrite the brief stating "admitted prior art." Also, appellant has a long standing tendency of stating the issues in a "the final rejection of ... is improper" format which is a conclusion rather than an issue. It would be more proper for appellant to adopt a "whether the final rejection of ... is proper (improper) format which states the issue.

Item 9: Page 12, paragraph 2, line 3 of the brief refers to parts shown in red. Since this is an IFW application an appellant's papers are scanned in black and white, nothing is shown in red. Appellant may be able to send or hand carry papers with red markings to the examiner and the Board so that the Office may see what is red.

Note that these items are not meant to delay action on the brief, but are deemed appropriate to provide a clear record.


Stephen J. Castellano
Primary Examiner
Art Unit: 3727

CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that this Petition to Withdraw Notice of Non-Compliance is being sent via facsimile to 703 305-3762 on July 9, 2004


Konstantine J. Diamond

Argument and Request for Relief

Introduction

Not one of the Examiner's objections merits rejection of Appellant's Appeal Brief and further delay of review of the patentability of Appellant's patent application. Although the objections could easily be addressed in a Substitute Appeal Brief, Appellant requests intervention in this matter because this is only one example of continuous and widespread unfair treatment by the Examiner of Appellant's patent applications and because past experience demonstrates that conforming the Brief to the Notice of Non-Compliance may not avoid procedural conflicts anyway.

Appellant believes it has no alternative but to draw the line on what might at first appear to be an isolated trivial procedural matter. Appellant has been treated unfairly in a dozen or more patent applications being handled by this Examiner, both procedurally¹ and in terms of unreasonable rejections. Appellant chose to pursue review of these unreasonable rejections by the Board of Appeals. However, the Examiner has generated numerous obstacles to such Appellate review, including issuing Notices of Non-Compliance for Appellant's Briefs, Notices of Abandonment and other procedural delays.² Rather than petition, Appellant has previously attempted to work with the Examiner with Substitute Briefs in response to the unfounded Notices of Non-Compliance.

In hindsight, the past decisions to attempt to appease the Examiner were in error. Even Substitute Briefs no longer appease the Examiner, who most recently wrongfully abandoned an application for his purported dissatisfaction with the sufficiency of the arguments in the Substitute Appeal Brief.³ Thus, Appellant has no choice but to petition for withdrawal of the Notice of Non-Compliance.

There is no support in the Rules or in the MPEP for the Examiner's rejection of Appellant's brief. None of the things in Appellant's Brief about which the Examiner complains are misleading, unclear or would in any way make consideration of the Appeal more difficult for

¹ See, only for example, Decision on Petition, Exhibit A, granting petition to withdraw holding of abandonment issued because an Amendment was filed one day after a snow emergency closed the PTO on the six month due date for the Amendment, despite the Examiner's awareness of the snow emergency.

² See, for example, Decision on Petition, Exhibit B, granting Petition after Examiner's Answer stated that all of the claims stand or fall together, contrary to Appellant's Brief. Same appeal returned to Examiner 21 months after Notice of Appeal was filed because the Examiner did not conduct the mandatory Appeal Conference. See Exhibit C.

³ See Decision on Petition, Exhibit D, granting petition to withdraw holding of abandonment, where the Examiner abandoned application for the reason that the arguments in the Substitute Appeal Brief were "insufficient." This was Appellant's second attempt to appeal, because Examiner had reopened prosecution during Appellant's first attempt to appeal two years earlier.

Docket No.: RPC 0575 PUS
Serial No. 09/921,762

the Board. The Notice of Non-Compliance, when viewed in the context of the other procedural delays, is clearly just another unwarranted obstacle to Appellate review.

"Prior Art Fig. 1"

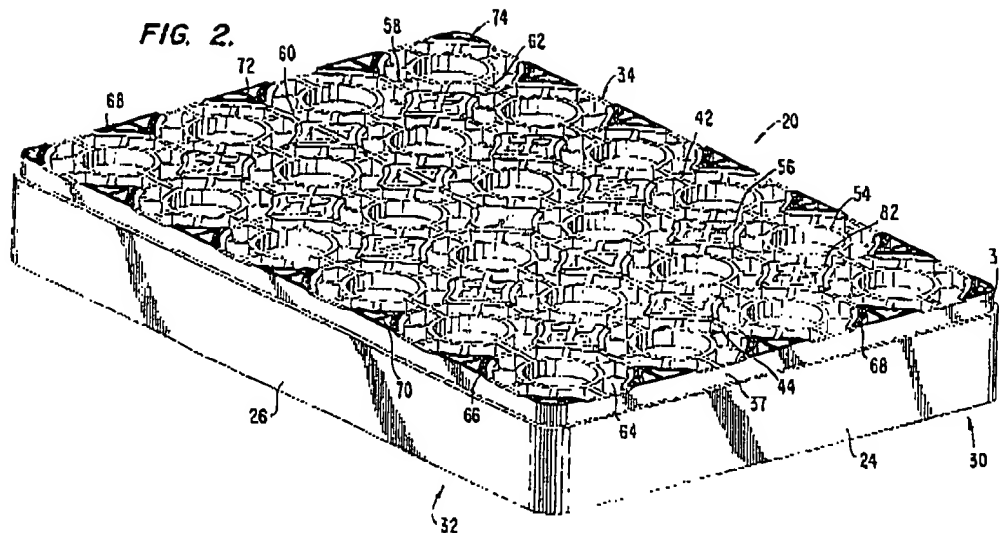
"Prior Art Fig. 1" is mentioned for the very first time in the Statement of Issues, which defines "Prior Art Fig. 1" as follows: "...the admitted prior art in Fig. 1 and sections of the specification which describe prior art ("Prior Art Figure 1")." Thus, the Examiner's definition has been incorporated into this term "Prior Art Fig. 1" for convenience. Also, it is perfectly accurate, because the "sections of the specification which describe prior art" only describe the prior art that is shown in Fig. 1. Even if there were some arguable slight incongruity between the terms (which there is not), Appellant's Statement of Issues is a clear summary of the rejections on appeal. Of course, details of the rejections are found in the Argument sections of the Appeal Brief and the Examiner's Answer (when filed).

"The final rejection . . . is improper"

The Examiner does not like Appellant's phrasing of the Statement of the Issues. The Examiner does not argue that the Statement of the Issues is substantively inaccurate, misleading, or even argumentative. There is no rule requiring a specific format of the Statement of the Issues. Appellant's Statement of the Issues clearly summarizes the issues on appeal and clearly and succinctly states Appellant's position on those issues without arguing those issues. This is not a proper ground for rejecting Appellant's Brief.

"Parts Shown in Red"

The Examiner has objected to the brief including a drawing where parts are shown in red for convenience. There is no rule against including color drawings in an Appeal Brief. Additionally, whether one reviews the Brief in color or in black and white, the Brief is clear because it includes both a reference to color (red) and the reference numerals on the drawing. This section of the Brief (the drawing and the paragraph referencing the drawing) is reproduced below. Since this Petition is being sent via facsimile, evaluation of a black and white version of this section will be easy.



D) and E) Claims 7, 9-11, 30, 44 and 47

The Examiner indicates that, in Apps '532, he is reading the rail at the bottom periphery of the crate, together with redoubt members 66, 68 and redoubt struts 70, 72 (shown in red above) as the claimed "drag rail." [page 12 of Appeal Brief]

Therefore, this is not a proper ground for rejecting Appellant's Brief.

Closing

Again, in the past, Appellant would normally have filed a Substitute Brief complying with these trivial requests from the Examiner. However, because of the Examiner's established practice of procedural obstacles in this and other patent applications, Appellant must draw the line and request withdrawal of the Notice of Non-Compliance. No fee should be due; however, if any fees are due, please charge to Deposit Account No. 50-1984.

Respectfully submitted,

Dated: July 9, 2004

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